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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 525

AYRSHIRE COLLIERIES CORPORATION, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEES TO AFFIRM.

MAY IT PLEASE THE COURT:

The motion to affirm the decree of the District Court filed by appellees, the United States of America and the Interstate Commerce Commission, is predicated on the charge that "the appeal presents no substantial questions."

In an appeal taken from a previous decision of the District Court in a review of the Interstate Commerce Commission order and report involved in this appeal, the Supreme Court, after consideration of appellees' motion to affirm and our brief in opposition, noted probable jurisdiction. (See case No. 467, October Term, 1946.) As the appellees indicate by footnote on page 1 of their present motion to affirm, the previous decision of the District Court made on June 5, 1946, was reversed by this Court because one of the members of the three-judge court had not participated in the determination. As we point out in our statement as to jurisdiction, however, this Court, under the circumstances, did not review the Commission's order and report or the record before the District Court, but suggested "that the District Court be reconvened in accordance with the Act so that three judges may hear and determine the application to enjoin the Commission order in issue." *Ayrshire Collieries Corporation, et al.*, v. *United States*, 331 U. S. 132, 144. Thus, there has not been a review by this Court on the merits of the substantial questions presented by the order and report of the Commission which are the subject of this appeal.

Appellees also by footnote on page 1 of their motion to affirm suggest that we have failed to serve notice of this appeal upon the Attorney General of Indiana, as required by U. S. Code, Title 28, Section 47a. As the record lodged with the Clerk of this Court will clearly show, a notice of this appeal, together with copies of all appeal papers, was served upon Honorable Cleon H. Foust, Attorney General of the State of Indiana, on January 23, 1948, and acknowledgment of such service was filed with the Clerk of the District Court on January 27, 1948.

Throughout this brief references to the "existing" or "present" rates are to the rates in effect at the time of

the filing of the new tariffs (which were suspended and later cancelled by the Commission) and continued in effect during the proceedings before the Commission. By "proposed" rates is meant the new rates published in the tariff supplements filed by the carriers, the subject matter of the suspension proceeding, I. & S. Docket No. 5139, and by "approved" rates is meant the rates and rate relationships set forth in the Commission's report and which it indicated the carriers might, if they wished, publish as lawful rates. The recent general increases in freight rates throughout the nation as a whole will be disregarded in describing the rates and rate relationships involved in this appeal.

Appellees preface their argument by a statement of the "history of the rates involved", which contains several inaccurate and misleading statements. We will refer to such errors later in this brief. We will discuss here the propositions urged by appellees in the order presented in their motion. We will also discuss substantial questions involved in this appeal which are not referred to by appellees.

For convenience the pertinent provisions of the Interstate Commerce Act (hereinafter referred to as the "Act") are set forth in this brief as Appendix A, *infra*, pp. 33-35.

I.

The Commission Had No Authority or Jurisdiction in the I. & S. Docket No. 5139 Proceeding to Order an Increase in or Change in the Relationship of the Existing Rates From Indiana.

Appellees first attack our contention that the Commission was without authority or jurisdiction to enter in the I. & S. Docket No. 5139 proceeding the order of July 9, 1945.

This proceeding before the Commission was initiated by the complaint of the Coal Trade Association of Indiana, one of the appellants herein, seeking the suspension of certain new rates, contained in rate schedules filed by the carriers serving Indiana mines, to Rockford and other destinations in northern Illinois and to Beloit, Wisconsin. The Commission, acting upon said complaint, by its order of July 30, 1942, instituted an investigation into the lawfulness of the new rates and ordered the schedules of new rates suspended. That order recites the filing with the Commission of tariffs containing schedules stating new individual and joint rates and lists a number of supplements to the tariffs of a number of carriers. The order proceeds:

> "IT IS ORDERED, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz.: * * * (enumerating various supplements to tariffs of certain railroads) And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order."

After reciting that said schedules make certain increases and reductions in interstate rates on coal, that the rights and interests of the public appear to be injuriously affected thereby and that the Commission is of the opinion that "the effective date of the said schedules contained in said tariffs should be postponed pending said hea ing and decision thereon," it is ordered "That the operation of the said schedules contained in said tariffs be suspended," and shall not be changed pending the expiration of the period of suspension or any extension thereof. The order then assigns "this proceeding" for hearing.

The order of the Commission of July 9, 1945, the subject

of this appeal, requires the respondent carriers to cancel the new rates which were published in 1942 and suspended by the Commission by its order of July 30, 1942. The order proceeds further to require the carriers "according as they participate in the transportation * * * (1) to cease and desist from practicing the unjust discrimination * * * and the undue prejudice and preference * * * found in said report to exist, and (2) to publish, maintain and apply rates * * * which will avoid and remove the said unjust discrimination and undue prejudice and preference." The part of the order here quoted can and does apply *only* to the present or existing rates from the Indiana origins, *i.e.*, the rates in effect at the time of the entry of the order, a subject matter that was not before the Commission in the I. & S. Docket No. 5139 proceeding.

The jurisdiction of the Commission over and its authority to suspend rates are contained in and may be exercised only under the provisions of Section 15 (7) of the Interstate Commerce Act, *infra*, p. 34. That Section reads in part as follows:

> "Whenever there shall be filed with the commission any schedule stating a new individual or joint rate * * * the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint * * * to enter upon a hearing concerning the lawfulness of *such rate* * * * and after full hearing * * * the commission may make such order with reference *thereto* as would be proper in a proceeding initiated after it had become effective." (Emphasis supplied.)

It is clear from the provisions of Section 15 (7) that the Commission is there given power to enter upon a hearing regarding the lawfulness of new rates and to suspend the operation of such new rates pending the hearing and decision.

The order of the Commission of July 30, 1942, clearly deals only with the new rates contained in the schedules enumerated in the order, the effectiveness of which was suspended. The proceeding instituted by the order, the investigation and the hearing entered into concerned *only* the lawfulness of the new rates. The Commission did not enter in the I. & S. Docket No. 5139 proceeding "an order for investigation and hearing" respecting the lawfulness of the existing rates from and between mines and mine origin groups in Indiana to any destination in Illinois or to Beloit, Wisconsin.

Appellees in their motion to affirm (p. 6) state that the schedules enumerated in the order of July 30, 1942, republished the existing rates. This is an incorrect statement as to any of the rates to Rockford and the other destinations in Illinois. The Milwaukee Railroad filed supplements to three of its tariffs. One of those supplements contained rates to Beloit, Wisconsin, in which the Milwaukee published new rates via joint-line routes from mines in Indiana and republished its present single-line rates from mines served by it. The Milwaukee and other carriers serving Indiana origins did not republish without change the existing rates to any destination in Illinois. (See petitioners' Exhibit No. 8 before District Court.)

Further, in the order of July 30, 1942, for the investigation and suspension of the new rates, the Commission uses the same language in ordering the hearing concerning the lawfulness of the rates as it does in suspending their operation. The hearing is "concerning the lawfulness of the rates, charges, regulations and practices stated in said schedules contained in said tariffs, viz.: * * *. And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order." The suspension is "of the said

schedules contained in said tariff." If, as appellees contend, the Commission's order of July 30, 1942, included the existing rates, there would have been a situation of having no lawful rates in effect, because all rates, present and proposed, would be suspended pending hearing and decision. No such intent can be attributed to the Commission. The order for investigation and suspension affected only the proposed new rates.

With respect to the one schedule that republished the present single-line rates of the Milwaukee to Beloit, the Commission in its report said:

> "To Beloit * * * the rates * * * from Brazil and Linton mines on the Milwaukee * * * are not here proposed to be changed and therefore are not specifically in issue in this proceeding." (263 I. C. C. 179, at 202.)

This statement of the Commission shows that the hearing did not embrace the lawfulness of the present single-line rates of the Milwaukee to Beloit, even if such rates were republished in a schedule containing new rates.

Appellees cite the case of *Akron, C. & Y. Railway Co.* v. *United States*, 22 Fed. (2d) 199, 203, as sustaining the power of the Commission to increase or decrease existing rates in a proceeding under Section 15 (7) of the Act. In that case a three-judge court sitting in the Western District of New York had before it for review the Commission's decision in *Eastern Salt Cases*, I. & S. Docket No. 2440, and related dockets, reported in 122 I. C. C. 21. The Commission concluded in those proceedings, which included two complaint cases along with the investigation and suspension case, that an order should be entered in I. & S. Docket No. 2440 requiring the cancellation of the suspended schedules. The order prescribing reasonable rates for the future was entered in its complaint Dockets Nos. 16695 and 14250, specifi-

cally attacking the lawfulness of the existing rates, heard in conjunction with I. & S. Docket No. 2440. The Court's opinion clearly establishes that the District Court's holding, that the Commission had power to increase or decrease existing rates, rested on the Commission's authority under Section 15 (1) in the complaint proceedings.

The Commission decisions cited by appellees do not support their position. In *Advances in Rates—Western Case*, 20 I. C. C. 307, the Commission did not enter any order requiring, or indicate it would attempt to make, any change in the existing rates; in *Lignite Coal From North Dakota*, 126 I. C. C. 243, after ordering certain suspended tariffs cancelled, the Commission ordered an investigation and hearing to determine specifically the reasonable rates for the future which it prescribed in lieu of existing rates; and in *Sioux City Terminal Railway Switching*, 241 I. C. C. 53, the Commission had before it not only an investigation and suspension proceeding but a complaint in its Docket No. 27899 specifically alleging that, and it entered "an order for investigation and hearing" to determine whether, existing practices and charges in connection with the switching services involved were unreasonable and unduly prejudicial. Further, the parties had notice of a hearing concerning, and presented evidence and arguments respecting their various contentions as to, the lawfulness of providing and maintaining private sidings within the plants of some shippers and not others.

Thus, while appellees contend that in an investigation and suspension proceeding under Section 15 (7) of the Act the Commission has the power to consider the lawfulness of and require changes in existing rates, they do not cite any authority which has so construed Section 15 (7) in a case such as we have here. The important distinction between the cases cited by appellees and that here is that the Com-

mission did not have before it in the proceeding out of which its order in I. & S. Docket No. 5139 was issued any complaint alleging unlawfulness in any respect in the existing relationship of the Indiana rates among themselves, nor had it entered on its own motion and without complaint any *order for an investigation into and a hearing concerning the lawfulness of the existing rates or rate relationships from Indiana.*

The determination of the question whether the Commission acted within the scope of its statutory authority in entering in I. & S. Docket No. 5139 the order of July 9, 1945, clearly presents so substantial a question as to command full review and consideration by this Court.

Appellees next argue that our contention is technical, that strict rules of pleading and evidence are not applicable in proceedings before the Commission, it being an administrative body. The question is not one of technical pleading or of a variance between the right asserted and the right proven. The substantial objection is that the lawfulness of the existing rates was not the subject matter of the hearing; the statutory authority of the Commission to act upon the existing rates was never invoked, as required by Section 15 (1) of the Act, by "an order for investigation and hearing" of the lawfulness of such rates; there was no hearing as to whether or not the present single-line rates of the Milwaukee were in violation of Section 2 of the Act; there was no hearing as to whether or not the present single-line rates of the Milwaukee in conjunction with the joint-line rates published by other carriers from mines in Indiana violated Section 3 (1) of the Act.

The cases cited by appellees in support of this contention are not applicable. For example, the case of *Alton & Southern Railroad* v. *United States*, 49 Fed. (2d) 414, 429-30, shows that there was voluminous evidence on the subject of

icing charges and whether or not the line rates were sufficient to cover such charges; that the hearings before the Commission covered an extended period and the parties had opportunity to meet the issues developed in the hearing. In the case of *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 131-2, the primary question was whether the Commission could rely on hearsay evidence received without objection. There was no question involved of an order of the Commission being entered on a subject not before it and regarding which there was no evidence. None of the cases cited by appellees deal with the jurisdiction of the Commission in a proceeding under Section 15 (7) of the Act to enter an order directed to the existing rates along where it had ordered the cancellation of the suspended rates.

Appellees say that our position on this point amounts to a reversal of our position in the proceedings before the Commission. At page 8 of their motion they make marginal reference to certain pages of the transcript of testimony before the Commission as showing that the evidence dealt with the lawfulness of the present rates. These pages of the transcript are attached hereto as Appendix B, *infra*, pp. 36-46. In each instance but one that testimony, while mentioning present rates, was with respect to the relationship of the rates from the Indiana origin groups on the one hand and the Illinois groups on the other, evidence pertinent to the issues in Docket No. 28881, which involved the question of discrimination in the Illinois intrastate rates against interstate commerce. At transcript pages 1793-4, the witness was testifying regarding the rates to Beloit to which no change was proposed from Illinois, but where increases were proposed from Indiana, except via the single-line routes of the Milwaukee and from the Southern Railway origins. Reference to Exhibits Nos. 58 and 59, about which the witness was testifying, shows that the

rates from Illinois produced lower ton mile earnings than the present rates from Indiana, and that the proposed rates from Indiana increased the ton mile earnings. In other words, the witness pointed out that at Beloit the average Illinois rate gave Illinois operators an advantage, which advantage would be increased by the proposed increased rates from Indiana.

That evidence does not go to the question of whether, and does not show, the existing single-line rates of the Milwaukee were unlawful. It was intended to show that as between the Indiana groups and the Illinois groups the "standard differential" should be re-established to Rockford and other northern Illinois destinations, in the 13th Section proceeding, Docket No. 28881, to remove the discrimination against interstate commerce in coal from Indiana caused by the Illinois intrastate rates. The Commission had so decided in the case of *Coal to Illinois and Wisconsin*, 232 I. C. C. 151, but because it did not there have jurisdiction over the Illinois intrastate rates, which it had in Docket No. 28881 currently before the Commission with I. & S. Docket No. 5139, the order never became effective.

In their motion to affirm (pp. 8-9) appellees quote from exceptions filed by the Coal Trade Association of Indiana to the proposed report of the Examiner, in an effort to show that the lawfulness of the present rates was before the Commission. Those quotations show that they dealt with the 13th Section case, Docket No. 28881, or with a combination of the two cases heard on the common record before the Commission. There we urged the Commission in its decision to restore the standard differentials as between the Indiana groups and the Illinois groups, which it was prevented from doing in its decision in *Coal to Illinois and Wisconsin*, 232 I. C. C. 151, for the reason stated above.

The Commission was hearing two cases. The position

of the Indiana coal operators was that the intrastate rates in Illinois to Rockford, which had been reduced in 1930 by 17 cents per ton, without any corresponding reduction in the rates from Indiana, unduly preferred Illinois coal operators and unduly prejudiced Indiana coal operators, except those served by the Milwaukee on shipments to Rockford and other destinations in Illinois on the line of the Milwaukee. The proposed increased rates from Illinois origins substantially restored the reductions of 1930. We urged upon the Commission that it could enter an order which would in effect restore the standard differential adjustment into this portion of Illinois as between the Indiana groups and the Illinois groups. That could have been done by the Commission exercising its jurisdiction in Docket No. 28881, to require an increase in the rates within Illinois, and by exercising its jurisdiction in I. & S. Docket No. 5139, to deny any increase in the rates from the Indiana mines to these destinations in Illinois. That is far from saying that there was ample evidence in this record to sustain an order requiring the removal of an alleged discrimination or an alleged undue prejudice and preference among the existing rates from origins in Indiana to any destination in Illinois.

We submit the appellants, coal operators of Indiana, are not estopped from urging the lack of jurisdiction of the Commission to enter the order here involved by anything said in any of their briefs, exceptions or petitions before the Commission, or by the evidence they introduced in the hearing before the Commission.

Appellees state we are merely seeking to have this Court substitute its judgment as to proper relationships for that of the Commission. That is not so. We do ask this Court to rule that where an investigation is undertaken to determine the lawfulness of proposed new rates, over a wide

territory of a coal producing area, the Commission cannot enter an order cancelling said proposed new rates and also an order requiring the existing rates of one carrier to a few destinations to be changed to correct alleged violations of the Act, when there was no hearing on that subject.

We submit that the question of the authority and power of the Commission to enter an order directly affecting the existing rates, after it had fully disposed of the issue before it, the lawfulness of the proposed new rates, is substantial, and should be decided by this Court.

II.

The Question of Whether or Not the Order of the Commission to Remove Undue Preference and Prejudice in the Existing Rates Is Supported by Findings of Fact and by Evidence Is Substantial.

This question is not discussed fully in the motion to affirm. The discussion by appellees is confined to the contention that there is no finding or evidence that the Milwaukee has effective control over the joint-line rates in which it participates in moving coal from mines on other carriers and that the order does not afford the carriers the alternative of removing the discrimination by increasing the lower rates of the Milwaukee or reducing the higher rates of the other carriers or a combination of the two.

The report of the Commission contains no finding, statement or even an intimation that the Milwaukee has any control over the rates published by any other carrier from mines in any Indiana group to any destination. The record is equally barren of any such statement. Such a finding is essential to sustain the order and the District Court erred

in not so holding. In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, at 649-650, it is said:

> "Where * * * a carrier whose lines reach, or which controls the rate to, one of the destinations, is a party to a joint rate to the other but cannot make or control the latter rate, or though it were to withdraw as a party thereto, or to cancel the rate, the discrimination would still continue—it cannot be held responsible, nor can any order to remove the prejudice run against it. * * * Assuming that neither rate is unreasonable, the one carrier cannot be compelled to alter its rate, because the other's is higher or lower for the same service. A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them."

There is no evidence in the record made before the Commission and no finding in its report that any carrier serving an Indiana group controlled the single-line rates of the Milwaukee from mines on its line in Indiana to destinations on its lines in Illinois. Likewise, there is no evidence or finding that the Milwaukee in any way controlled the rates published by the C. & E. I., the New York Central, the Pennsylvania, or any other carrier serving mines in Indiana, to Rockford or other destinations on the line of the Milwaukee in Illinois. If the Milwaukee withdrew its participation in the joint-line rates, the difference between its single-line rates to Rockford and the joint-line rates to Rockford via any one of three other delivering carriers would still exist. Not a single one of the twelve destinations in northern Illinois used by the Commission as representative is served exclusively by the Milwaukee and only one, Forreston, is not served by some carrier other than the Milwaukee and Illinois Central. Appellees' contention

is contrary to the decision of this Court in the *Texas & Pacific* case cited and quoted above.

No effort is made by appellees to explain the lack of findings and evidence that the single-line rates of the Milwaukee unduly preferred the shippers on the Milwaukee and prejudiced those served by other carriers in the Indiana groups. The Commission has long recognized that a mere disparity in rates does not establish undue preference and prejudice. To be undue, preference and prejudice must be a source of advantage to the party or locality alleged to be favored and a detriment to the other party or locality. See *Chicago Live Stock Exchange* v. *Abilene & Southern Ry. Co.*, 223 I. C. C. 141, at page 152; *A. E. Staley Mfg. Co.* v. *B. & O. R. Co.*, 262 I. C. C. 352, at page 356. This rule of law has been stated by this Court in *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, at page 521, and in other cases.

The Commission has made no finding that the single-line rates of the Milwaukee prevented any shipper served by another carrier in Indiana from shipping coal. It has made no finding that any coal producer served by any other carrier in Indiana would ship more coal if the lower single-line rates of the Milwaukee were increased or cancelled. No witness testified on that subject. The truth is that the single-line rates of the Milwaukee enabled shippers on its line to compete with coal shipped from Illinois mines on their lower rates to Rockford. Those lower Illinois rates are what prevent Indiana coal operators other than the Milwaukee from shipping coal. The Milwaukee rate from Brazil for its 236-mile haul is the same as the rate from the Springfield group in Illinois to Rockford, for an average haul of 257 miles. The Commission's approved rates from the Brazil group to Rockford are 12 cents higher than from Springfield, although the average distance from the Brazil

group is 6 miles shorter than from the Springfield group. The present rates from the Brazil group via joint-line routes to Rockford are 17 cents higher than from the Springfield group. The present rates from the Southern Illinois group are only 13 cents per ton higher than the joint-line rates from the Brazil group to Rockford, while the distance from the Southern Illinois group is 112 miles greater than from the Brazil group. It is not the single-line rates of the Milwaukee that in any way prevent the Indiana operators, who must ship on the joint-line rates from the Brazil and Linton groups, from selling and shipping coal to Rockford and other destinations on the line of the Milwaukee in Illinois; it is the rates from the Illinois mines to those destinations.

The Commission admits there is no evidence of undue prejudice and preference in the rates from the Brazil and Linton groups to Rockford and other Illinois destinations by its statement on page 195 of its report (263 I. C. C. 179, 195): "Under the circumstances recited, an extensive showing of injury through the loss of tonnage to particular coal shippers or consumers by reason of the discriminatory rates here before us is not required." But under any circumstances there must be *some* evidence of injury to one and benefit to another to sustain an order of prejudice and preference. The Commission has pointed to no such evidence because there was none. The cases cited by the Commission do not sustain its statement.

The Commission precedes the above quoted statement by saying, "The transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group." Appellees refer to that statement by the Commission as establishing that the difference between the Milwaukee's

single-line rates and the joint-line rates do not reflect any substantial difference in transportation conditions. The statement is not supported by the evidence. The transportation conditions of the Milwaukee were described in detail by witness Whalen, but no witness described or referred to the transportation conditions of any of the other carriers serving mines in the Brazil and Linton groups, except the C. & E. I. Railroad. In addition to the Milwaukee, the B. & O., Pennsylvania, New York Central, C. & E. I. and Indiana railroads serve mines in the Brazil group, and the C. I. & L. (Monon), C. & E. I., Illinois Central, New York Central and Pennsylvania serve mines in the Linton group. With only a showing of distances, grades and curves by the C. & E. I. for its own line, and nothing as to other transportation conditions, and no showing at all as to the other carriers, the Commission erred in stating the transportation conditions via the Milwaukee and Illinois Central from Indiana do not differ materially from those via other carriers serving the Brazil and Linton groups.

The evidence shows that the transportation conditions via the single line of the Milwaukee are ideal. There is no passenger traffic over its line from the coal groups to Chicago; one engine hauls more cars than even the C. B. & Q. from Southern Illinois; its service in originating the coal is at a minimum, it has no difficult grades or curves; no interline switching is involved. The record shows nothing of these facts as to the other carriers serving Indiana, except grades, curves and the type of motive power used on the C. & E. I.

The District Court seriously erred in holding that the findings of fact sustained the Commission's order and that the evidence supported the findings of fact. We submit it is the right of appellants that this Court pass upon the question of the power of the Commission to order carriers

to cease and desist from an alleged prejudice and preference in rates when there is no evidence of the facts essential to constitute an undue prejudice and preference and there are no findings of such facts by the Commission. We further submit that this question is substantial.

What has been said above regarding the lack of findings of fact that would constitute a violation of Section 3 (1) of the Act by the present rates is equally true with respect to the proposed rates.

We have assigned as error that the order of the Commission is invalid because it does not leave the carriers any alternative in complying with the prejudice and preference phase of the order. Appellees state that a complete answer to this contention is that the order was entered under Section 15 of the Act, and not under Section 3. That simply is not so.

This part of appellees' argument obviously is based upon a misconception of the Commission's order. They argue that the order was entered under Section 15 (1) and not under Section 3 (1), and therefore it was not necessary to afford an alternative. Appellees cite a footnote from the opinion of the Court in the case of *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, 650, referring to the statement of the Court that "Where an order is made under § 3 an alternative must be afforded." The footnote reads:

> "This is not true of an order pursuant to § 15 (1), prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section."

Pursuant to Section 15 (1), the Commission may prescribe minimum or maximum or maximum and minimum rates. But the order here involved was not issued under that section. Certainly the language of the Commission's report and order shows that the Commission did not think

it was acting pursuant to Section 15 (1). The order recites that the carriers shall "cease and desist from practicing * * * undue prejudice and preference *under Section 3 (1)* * * * and apply rates and charges which will avoid and remove said undue prejudice and preference." (Emphasis supplied.) The order does not prescribe a particular rate or rates which shall be made and observed either as minima or maxima in order to remove the alleged prejudice and preference. Further, in Conclusion No. 4 of its report (263 I. C. C. at 217-218), the Commission plainly says that the rates are "in violation of Section 3 (1) of the Act * * * to the extent that such rates reflect * * * rate relations * * * which differ from the relations reflected by the rates * * * set forth as approved in this report * * *." That the Commission has here prescribed a *relationship of rates*, as distinguished from a particular rate, which it seeks to compel carriers to publish to avoid a violation of Section 3 (1) is so plain it hardly warrants further discussion.

When this Court, in the *Texas & Pacific* case, referred to an order entered pursuant to Section 15 (1) and, in the later case of *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476, referred to an order being entered under Section 15 and not under Section 3, it was dealing with specific rates required by the Commission to avoid a Section 3 (1) violation, not to an order like that here to remove the violation by reducing or eliminating a differential between existing rates. If the facts warrant, the Commission may enter an order requiring a specific rate to cure an instance of undue prejudice or preference, and it is such an order that is referred to in the *Youngstown* case and the footnote to the *Texas & Pacific* case. But as heretofore pointed out, no specific rates were required by the order in this case.

The assignment of error is based on the practical effect

of the order because the Milwaukee does not control the rates of the other carriers; it cannot comply with the order by reducing the rates of the other carriers—it can only comply by increasing its own rates. The very fact that actually no alternative is afforded the Milwaukee shows the fallacy of appellees' argument that the Milwaukee effectively controls any rates but its own single-line rates.

III.

The Question of Whether or Not the Order of the Commission to Remove Unjust Discrimination in the Existing Rates Is Supported by Findings of Fact and Evidence Is Substantial.

This question is mentioned by appellees but, while important, is not fully discussed.

The order of the Commission of July 9, 1945, requires the carriers, according as they participate in the transportation "(1) to cease and desist from practicing the unjust discrimination under Section 2 of the Interstate Commerce Act * * * found in said report to exist, and (2) to publish, maintain, and apply rates and charges which will avoid and remove the said unjust discrimination * * *."

Section 2 of the Act, *infra*, p. 33, provides as follows:

> "If any common carrier subject to the provisions of this chapter shall * * * charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of * * * property * * *, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall

be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

The Commission has repeatedly interpreted this section as applying only where a like kind of traffic is transported for two shippers from the same origin to the same destination over the same line or route under substantially similar circumstances and conditions. *Petroleum Rail Shippers' Ass'n* v. *Alton & S. R.*, 243 I. C. C. 589, 639; *Petroleum Between Washington, Oregon, Idaho, and Montana*, 234 I. C. C. 609, 648.

In construing Section 2 of the Act, this Court has stated repeatedly that the purpose of this Section is to enforce equality between shippers of like commodities over the same line or haul, the same distance and between the same points; that the discrimination aimed at is that between individual shippers and not as between localities and communities; and that any fact or facts that produce an inequality of conditions and a change of circumstances justifies an inequality of charge.

In the early case of *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 145 U. S. 263, this Court said, at pages 281-2:

> "In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.' * * * 'To come within the inhibition of said sections, the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic under substantially the same circumstances and conditions.'"

In *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, this Court said, at page 166:

> "As we have shown in the recent case of *Wight* v. *United States*, 167 U. S. 512, the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor; and we there held that the phrase 'under substantially similar circumstances and conditions,' as used in the second section, refers to the matter of carriage, and does not include competition between rival routes."

In the more recent case of *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, in construing the applicability of like provisions of the Motor Carrier Act, Mr. Justice Black, speaking for the Court (p. 348), pointedly observed that "if the suspended rates were in effect, *transportation of the same commodity over the same haul* might cost a forwarder less than other shippers" and that "local less-than-truck-load rates charged shippers are in many if not most instances greater than rates on *like commodities between the same points* to be afforded forwarders under the proposed tariffs which the Commission ordered cancelled." (Emphasis supplied.) Further, at page 351, it is said:

> "* * * the Act represented a manifestation of the congressional purpose * * * to prevent favoritism by insuring equality of treatment on rates for substantially similar services. * * *"

In the case of *L. T. Barringer & Co.* v. *United States*, 319 U. S. 1, this Court sustained the finding and conclusion of the Commission that the charges there involved did not

result in unjust discrimination under Section 2 and said, at pages 6-9:

> "Section 2 is aimed at the prevention of favoritism among shippers. * * * But differences in rates as between shippers are prohibited only where the 'circumstances and conditions' attending the transportation service are 'substantially similar.'
>
> "We have repeatedly sustained a finding of the Commission that such a difference, based on a difference in identity of shippers or the ownership of the goods shipped, or on other circumstances irrelevant to the carrier service rendered, is an unjust discrimination to shippers. * * * The distinction between those cases and this is that here *the difference in the service charge is made between through shippers over different routes*, and is based on relevant differences in the 'circumstances and conditions' of the total transportation services rendered by the carriers. It was within the competence of the Commission to find that this involved no unjust discrimination." (Emphasis supplied.)

The Commission here made twenty major findings of fact. (263 I. C. C., at pages 213 through 217.) Nowhere in those findings is it stated, and there is no evidence in the record before the Commission, that any coal from any origin point to any destination was being charged a higher rate than other coal from the same origin point to the same destination moving over the same line under substantially similar circumstances and conditions. Finding No. 4 of the Commission does not state any facts that would constitute a violation of Section 2 of the Act. The finding shows on its face that there are thirty origin points in the Brazil group and thirty-one origin points in the Linton group; that the Milwaukee serves but four of the origins in the Brazil group and nine in the Linton group. Nowhere

does it appear that the origins served by the Milwaukee are served by any other carrier, and it is not so stated. The language of the Commission in the case of *Petroleum Between Washington, Oregon, Idaho and Montana*, 234 I. C. C. 609, at page 648, is applicable here:

> "Complainants say that the disparities against them resulting from the present and proposed rates from the northern Montana points constitute the violation of section 2 alleged in their complaint without particularity. *'However, their traffic does not originate at the same points as that of their competitors, and therefore section 2 does not apply.'*" (Emphasis supplied.)

The evidence affirmatively shows and the District Court specifically found (Findings 9 and 11) that the Milwaukee rates, where lower than those of other carriers serving origins in the Brazil and Linton groups, are via the single-line of the Milwaukee from origin to destination, while the rates in which the Milwaukee joins from origins in those groups on the lines of other carriers to such destinations are via two or more lines of railroad; that in many instances the hauls via such joint-line routes are 50 to 100 miles longer than via the single-line routes of the Milwaukee.

The evidence shows that these so-called groups cover a large area. The origins within the groups are frequently many miles apart. The short tariff route distance from West Clinton to Rockford is 228 miles via the single-line of the Milwaukee; the short tariff route distance from Cedar Point on the Pennsylvania Railroad to Rockford is 283 miles, a difference in haul of 55 miles. To St. Charles, Illinois, from West Clinton the single-line haul of the Milwaukee is 179 miles; the short tariff route distance via the Pennsylvania from Centre Point is 295 miles, a difference of 116 miles.

The findings of the Commission do not support its Conclusion No. 1 (263 I. C. C. at pages 217-218), that—

> "The present rates * * * from Indiana to the northern Illinois destinations * * * result * * * in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee or Illinois Central railroads, in violation of section 2 of the Act * * * to the extent such rates reflect * * * rate relations between such districts and the points in each of those districts to the respective destinations which differ from the relations reflected by the rates and rate bases set forth as approved in this report * * *."

The report states that the foregoing conclusion is based upon the major findings of fact. It is clear that the twenty findings of fact do not support that conclusion. The statement (263 I. C. C. at 215) that "The transportation conditions under which coal moves from Indiana and Illinois groups to those northern Illinois destinations are sufficiently similar to require the use of the same rate basis from all such groups," is not a finding that the circumstances and conditions under which coal moves from a point on the Milwaukee in the Brazil group to St. Charles or Rockford, Illinois, are substantially similar to the circumstances and conditions under which coal moves from a point on the New York Central Railroad in the Brazil group to St. Charles or Rockford. Such a finding could not be made because, as the District Court found (Finding No. 10), there is no evidence of record of the circumstances and conditions under which coal moves from mines in Indiana located on the New York Central, or any railroad other than the Milwaukee and C. & E. I., to any destination in northern Illinois.

The question here presented is substantial. Do the facts found by the Commission constitute a violation of Section 2 of the Interstate Commerce Act? As above shown, the

Commission and this Court have heretofore ruled that they do not. There is the further question of whether or not the facts found by the Commission are supported by substantial evidence.

Inherent in the decisions of the Commission and District Court on the subject of discrimination is the power of the Commission, in a proceeding such as I. & S. Docket No. 5139, to treat the thirty origin points in the Brazil group, four of which are served by the Milwaukee, five by the B. & O., ten by the C. & E. I., three by the New York Central, seven by the Pennsylvania, and one by the Indiana Railroad, as one point of origin, and to compel each of those carriers to charge the same rate from each of said origins. This Court in the case of *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 294 U. S. 499, at page 506, held to the contrary.

Appellees' erroneous definition of a "group" appearing in the margin of their motion to affirm (p. 3) may have led them to assume that a group was equivalent to a single origin point. A group in the midwest coal adjustment is the result of carriers serving mines in a fairly large area competing with one another by meeting the lowest rates of a competitor to important destinations. That the competing carriers do not universally meet these competitive rates is shown by the evidence herein. (See Exhibit 3, Part V, of the record before the Commission.) It appears that sometimes the carriers serving a group of origins will all publish the same rate to some destinations; at other destinations most of the carriers will publish the same rate, while others will publish higher or lower rates; and some do not publish any specific rates.

We submit that the question raised with respect to the order of the Commission pertaining to unjust discrimination under Section 2 of the Act is material and substantial

and one which the appellants are entitled to have determined by this Court.

We have discussed the lack of evidence of and findings of fact regarding the present rates that as a matter of law would constitute a violation of Section 2 of the Act; the same lack of findings of fact and evidence in this regard exists with respect to the proposed rates.

IV.

There Are Substantial Questions Involved Which Are Not Discussed in the Motion to Affirm.

We have, we believe, shown that the questions involved in these appeals, which are discussed in the motion to affirm, are substantial. These appeals involve other questions which we have set out in our assignment of errors and statement as to jurisdiction, which are substantial and are of importance generally as well as to the parties to these proceedings.

A.

Is the decision and order of the Commission arbitrary and invalid because in conflict with preliminary findings and not predicated upon a rational basis?

The average distances from the Brazil group to Rockford and Beloit are somewhat shorter than from the Springfield group in Illinois, but the Commission has approved rates from Brazil 12 cents per ton higher than from Springfield. The Commission has stated that a few cents per ton frequently controls the sale of coal, yet the Commission approves rates 12 cents per town lower from Springfield for a longer haul than from Brazil. That we submit is arbitrary and capricious, especially as the Com-

mission states that rates from Indiana mines should be on the same level as those from Illinois mines.

The Commission approves rates from the Brazil group that averaged $1.95 per ton for an average distance to twelve destinations in Illinois, termed by it as representative, of 256 miles. To Rockford, the principal and most important market for coal in the whole destination area, the Commission approves rates from the Brazil group of $2.07 per ton for a haul of 251 miles. The Commission condemns as discriminatory, preferential and prejudicial the proposed single-line rate of the Milwaukee from origins on its line in the Brazil group to Rockford of $1.95 per ton for a haul of 236 miles, but finds reasonable and approves a rate of $1.95 per ton from Springfield for an average haul of 257 miles. Is that decision the rational conclusion to reach from the facts, or is it abritrary and capricious?

There are numerous other instances of arbitrary determinations in the Commission's decision.

B.

Does the Commission have the power to require the Southern Railway to reduce its rates from the Boonville group to the level of the rates from the Princeton group because one mine in the Princeton group on the New York Central is 10 miles distant across country from a mine on the Southern in the Boonville group?

There was no evidence and no claim was made that the rates from the Boonville group to any destination are or would be unreasonable or otherwise violative of any provision of the Act; and no finding was made by the Commission to that effect. The evidence shows that the haul is 40 miles longer via the Southern from mines in the

Boonville group than from those in the Princeton group, and that as between the two groups the average difference in distance is 37 miles, Boonville greater than Princeton. Earlier in its report the Commission approved a 10 cent differential as between mines in the Brazil and Linton groups where the difference in distance was 34 miles. Is that part of the Commission's decision arbitrary and capricious?

C.

Does the Commission have authority under the Act to require the Milwaukee to charge higher rates than it believes proper from origins served by it, because other carriers serving other origins in the same general area choose to publish higher rates on which little or no coal moves?

D.

The Commission states in its report that it approved rates and rate bases set out in Appendixes A and D. (263 I. C. C. at pages 220-223, 226.) It approved rates from each origin group in Indiana and Illinois to each of twelve destinations in Illinois. Nowhere in the report is there any consideration of the reasonableness or lawfulness of the rates from any group to any one of the destinations. There is no discussion or finding with respect to whether or not the rates to any one of those destinations are preferential or prejudicial as between any of the groups or origins or as between any of the destinations.

The rates and rate relationships so approved as between the various groups and individual destinations are inconsistent. For example, as between the Southern Illinois group, which has ordinarily been considered the base group in Illinois, and the Brazil group in Indiana, which has been considered the base group in Indiana, the difference in

distance from Southern Illinois and Brazil at Belvidere, Illinois, is 170 miles, the difference in the approved rates is 18 cents per ton; to Rockford, where the difference in distance between Southern Illinois and Brazil is 112 miles, the difference in the approved rates is likewise 18 cents; but at Forreston, Illinois, the difference in distance is 83 miles and the difference in the approved rates is 25 cents; and at Rochelle, Illinois, the difference in distance is 100 miles and the difference in the approved rates is 16 cents. There is no finding and no evidence to support a finding of differences in transportation conditions or any other factor that would justify such differences in rate differentials. Certainly, that is not the logical relationship expected of rates that are supposed to be reasonable, non-discriminatory, non-prejudicial and non-preferential. Other instances of the arbitrary and capricious character of the approved rates are as follows: To Belvidere, Illinois, the average distance from the Brazil group is 258 miles, the approved rate is $2.07; from the Springfield group the average distance is 279 miles, the approved rate is $1.95. From the Princeton group to Belvidere the average distance is 364 miles, the approved rate $2.24 while from the Centralia, Belleville and DuQuoin groups in Illinois, the distances are 351 miles, 395 miles and 363 miles, respectively, and the approved rates $2.15; and from the Southern Illinois group, for a distance of 428 miles, the approved rate is $2.25, but one cent more than from Princeton. To Geneva, Illinois, for a distance from Brazil of 217 miles, the approved rate is $1.84; from Springfield the distance to Geneva is 230 miles and the approved rate is $1.75. The average distance from all Indiana groups to Geneva is 266 miles and the average of the approved rates is $1.93. The average distance to Geneva from all the Illinois groups is 298 miles and the average of the

approved rates is $1.88. Is it logical for the Commission to impose upon the Indiana operators a rate 5 cents higher for a haul 32 miles shorter than is imposed upon the Illinois operators? The Commission considered only the average of these arbitrary rates from the Illinois and Indiana groups to the whole of the twelve destinations rather than complying with the statute and determining just, reasonable and non-preferential rates to each destination from each of the origins in the origin groups involved.

We submit that the question of whether or not, upon the record in these proceedings, the decision of the Commission was arbitrary and invalid, is of vital importance not only to the parties to these proceedings but to the public generally.

E.

Inherent in this appeal is the question of the power and authority of the Commission, directly or indirectly, to require all of the carriers serving various and different origin points in an area of wide extent, as is any one of the coal groups in either Indiana or Illinois, to charge the same rate from each of those origins via every route, irrespective of differences in the traffic and transportation conditions over the routes of the various carriers involved and of the differences in the length of the hauls involved, merely because at certain destinations some carriers think it is good business to meet the competition of another carrier by equalizing their rates with the rates of such other carrier. The Commission has characterized as a "dual basis of rates" a different rate charged by one carrier than by other carriers serving origins in the same group. This characterization is new in the language of the decisions of the Commission. It is a situation that has existed in this territory for years,

both from groups in Illinois as well as in Indiana. This decision of the Commission raises a question, and it is a substantial one; namely, may the Commission lawfully deprive a carrier serving mines in Indiana of its right to compete with carriers serving other origin groups in Illinois, in order that its rates be the same as the rates of carriers serving other origins in the same general vicinity in Indiana?

Conclusion.

We submit that the questions raised in this appeal are substantial, many of which have not been passed upon by this Court, and we urge that this Court accord to this appeal a full and complete hearing.

Respectfully submitted,

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Chicago, Illinois,
February, 1948.

APPENDIX A.

The Interstate Commerce Act, as amended, U. S. Code, Title 49, provides in part:

"Sec. 2. If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

"Sec. 3. (1) It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

"Sec. 15. (1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this chapter, or after full hearing under an order for in-

vestigation and hearing made by the commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the commission shall be of opinion that any individual or joint rate, fare or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in the first section of this chapter, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

* * *

"Sec. 15. (7) Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders, without answer or other formal pleading by

the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

APPENDIX B.

Excerpts From Transcript of Testimony of Witness Harold V. Scott on Behalf of Coal Trade Association of Indiana, Being the Pages of the Transcript Referred to on Page 8 of Appellees' Motion to Affirm.

(p. 1793)

"Q. (By Mr. Wilkinson, on direct examination.) How do the earnings under the present and proposed rates from the Illinois groups compare with those from the Indiana groups to Beloit?

"A. Referring to my exhibit marked No. 58, this exhibit shows that to Beloit from a composite of the Illinois groups the average present rate, as shown under Column 7, reflects per ton-mile earnings of 6.65 mills and the average proposed rate 6.61 mills. The earnings from the Indiana groups to Beloit are higher, as shown under Columns 12 and 13.

"Q. How do the earnings from Southern Illinois compare with the earnings from Brazil-Clinton?

"A. Referring to my exhibit which has been marked No. 60, this exhibit shows that to Beloit, the present and proposed rates from Southern Illinois reflect ton-mile earnings of 6.09 mills and the present rate from Brazil-Clinton reflects earnings of 7.78 mills. The proposed rate from Brazil-Clinton reflects ton-mile earnings of 7.78 mills from the C. M. St. P. & P. mines and 8.41 mills from other mines. Again it will be noted that the earnings from the Southern Illinois group under the present rate is considerably lower than the earnings under the present and proposed rates from Brazil-Clinton.

"The same situation is reflected in the car-mile earnings."

(p. 1794)

"Q. The testimony and exhibits that you have presented are intended to prove, are they not, that the rates and differentials as now in effect and as now proposed to the northern Illinois destinations and as now proposed to Beloit are not proper. What is the contention of the Indiana operators as to what rates would be proper?

"A. It is our contention that the rates from Indiana to destinations in northern Illinois should be on the basis of their standard differential under Southern Illinois which was in effect prior to the 1930-1932 disruption. To Beloit, it is our contention that the rates should continue in effect the differential relationship with Southern Illinois, which relationship has been in effect for many years.

"Q. Do you have an exhibit showing what these rates would be?

"A. Yes, and it has been marked Exhibit No. 72. This is a statement showing the rates that would obtain from the Indiana groups to the representative destinations in northern Illinois and Beloit, Wisconsin, and to a composite of such representative destinations based on the standard differentials between the Indiana groups and the Illinois groups.

"These rates are arrived at in the following manner: The rates proposed from Southern Illinois to these representative destinations have been taken as the base group from the Illinois group. From the base group in Indiana, the Brazil-Clinton group, the rates shown on this exhibit have been made on their standard differential of 30 cents under Southern Illinois."

(p. 1845)

Cross-Examination.

"Mr. McElroy: In other words, the Illinois Commerce Commission did not allow the increase granted by the Interstate Commerce Commission simultaneously with the publication of the interstate rates.

"Mr. Bisett: This is correct.

"Mr. McElroy: So there is a gap of about 90 days before Illinois allowed the increase.

"Mr. Biaett: Yes, that is right.

"Exam. Trezise: Well, may we have it generally understood, then, that the present rate is $1.45 from Victoria to Rockford, Illinois, and it is proposed to increase it to $1.60, is that right?

"Mr. Biaett: Via the Burlington, which is the lowest rate from Victoria to Rockford, and the rate which we have shown throughout the exhibit.

"Exam. Trezise: And that is the longest distance and has probably a longer distance than the other route, and that distance being 198.1. That is the shortest route via the Burlington and its connections, is that right?

"The Witness: Yes, sir.

"Exam. Trezise: Thank you. Do we have some further questions now?

"Mr. Zoll: I had a couple of questions, Mr. Examiner.

"Exam. Trezise: Mr. Zoll:"

(p. 1846)

"Q. (By Mr. Zoll.) Mr. Scott, as I understand your testimony, you are of the opinion that the present rates from Indiana to these northern Illinois destinations are unreasonable, in violation of Section 1, is that correct?

"A. The present rates are unreasonable in violation of Section 1? Yes. Our contention is that probably the strongest—our principal contention is that they are relatively unreasonable with relation to the rates from the Illinois fields.

"Q. In relation to the present rates from Illinois?

"A. Both present and proposed.

"Q. Then the answer to my question is yes?

"A. Yes, I modified it just a little.

"Q. Well, I wonder, if that is your opinion, why you have not previously filed any complaint against the rates?

"A. The answer to that question, Mr. Zoll, is this:

That these rates have practically been in constant litigation, or have been constantly—have been actively handled by the carriers and the operators since these rates were first published in 1930. I don't know of a year that has gone by since then that there hasn't been some sort of an attempt to straighten out those rates. There has been no lapse of time that we filed a complaint that is before the Commission in the thirteenth section proceeding, or an I. & S. proceeding. They were before the Commission on the rates from the Milwaukee mines, which wound up in the Supreme Court. They were always in constant—these rates were constantly being acted on or rather I should say constantly considered with the purpose of straightening them out."

(p. 1847)

"Q. What was in my mind was this, that a statement that you believed the rates from Indiana unreasonably doesn't carry as much weight with me as it might, in view of the fact that you never bothered to do anything about it.

"A. I think if you will check the record in I. & S. Docket 4368, in which the carriers proposed to reestablish the normal differentials from the Brazil-Clinton group to most of these northern Illinois destinations but did not propose to do it from the Princeton-Ayrshire and Boonville group, you will find Indiana operators were very active in that proceeding, and were successful in that proceeding.

"Q. I understood you to say that the present rates from Indiana were unreasonable.

"A. Yes.

"Q. As they are today, and would continue to be so if these rates were not proposed in this I. & S. case.

"A. I don't quite—if these rates were not proposed. We don't agree with the proposed rates either, of course.

"Q. No. You think that the present rates from Indiana violate Section 1?

"A. Yes.

"Q. They are excessive? And they have done that for some years, I gather?

"A. Yes."

(p. 1848)

"Q. All right. It is also your opinion, then, also that the present and proposed rates from the Illinois mines violate Section 13 of the Act?

"A. Present rates from the Illinois and Indiana mines violate Section 13 of the Act. Yes, if I have stated your question right.

"Q. Well, I will put it this way: Is it not your opinion, as I read your testimony, that the present as well as the proposed rates from the Illinois mines are unduly low, in violation of Section 13?

"Mr. Morgan: I object. That is a legal conclusion.

"Mr. Zoll: No, it is not a legal conclusion. I am asking the opinion of this witness.

"Mr. Morgan: The witness is not a lawyer.

"Mr. Zoll: I didn't ask him if he is a lawyer.

"Exam. Trezise: I think we will let him answer this.

"Q. (By Mr. Zoll.) I just wanted to know, Mr. Scott, what your opinion was. As I read Part 2 of your proposed statement, that is the impression I get of your position.

"A. That the rates from Illinois, both the present and proposed rates from Illinois, are in violation of Section 13?

"Q. Yes, sir.

"Mr. McElroy: He asked you if they were unduly low, in violation of Section 13.

"The Witness: They are—"

(p. 1849)

"Exam. Trezise: Well, about this violation of Section 13, I think that is objectionable. I will go along with you on that.

"Mr. Zoll: Well, I just call attention to the fact that the witness stated it on his direct.

"Exam. Trezise: Giving his opinion about the rates, yes.

"Mr. Wilkinson: I think you will find page 2 just states the contention and does not give an opinion; the contention we are making, which we trust the evidence supports.

"Q. (By Mr. Zoll.) Well, you don't know offhand what your contention—

"Mr. Wilkinson: The objection has been sustained to your question.

"Mr. Zoll: I didn't understand so.

"The Witness: If I can have the question again—

"Q. (By Mr. Zoll.) Your contention at the present time—

"Mr. Morgan: The objection has been sustained.

"The Witness: You are asking me to answer that and I don't know whether it has been objected to or not.

"Mr. Zoll: Let's start over.

"Q. (By Mr. Zoll.) Do you contend that the present rates from the Illinois mines to these Illinois destinations are unreasonable?

"Mr. Morgan: If he knows."

(p. 1850)-

"Mr. Zoll: I am merely asking for his position. I want to know what he is contending. Certainly there is nothing objectionable to that.

"Exam. Trezise: All right. That is his contention.

"The Witness: My contention is that the present rates from Illinois to these destinations are unreasonably low with relation to the rates from the Indiana fields.

"Q. (By Mr. Zoll) They must be unlawful, then?

"A. Yes.

"Mr. Cardy: We wouldn't need the court if we could put witnesses on to prove that.

"Mr. Morgan: The whole testimony on that line is objectionable and I think it should be stricken from the record.

"Exam. Trezise: I think we will let him give his opinion on it.

"Mr. Wilkinson: He was asked what his contention was and he has stated what the contention is.

"Exam. Trezise: Yes; we will let that stand.

"Q. (By Mr. Zoll) Now, in I. & S. 5139, the carriers have proposed certain increases in the rates. Is it your contention that the rates from the Illinois mines, as proposed, are improper or unlawful?

"A. Yes, with relationship to the rates from Indiana.

"Q. In view of the fact that you have said that the present rates from the Illinois mines are unduly low, have you in the"

(p. 1857)

"hitting the wrong button on the machine.

"A. That is right.

"Mr. Bather: While we are on Exhibit 72, I would like to ask Mr. Scott some questions.

"Exam. Trezise: Mr. Bather.

Cross-Examination (Continued).

"Q. (By Mr. Bather) On page 1 of this exhibit, you do advocate an increase in the rates from Indiana mines to Freeport and Rockford, do you not?

"A. Yes, because we have related our rates to those proposed—in this particular exhibit we have related our rates to those proposed from Southern Illinois. However, the rates shown here whatever rates may be shown here should be related to those from Southern Illinois, if the rates proposed from Southern Illinois are approved. If any other basis is approved, then our rates as suggested here should be changed to correspond with the standard differentials with the Illinois rates.

"Q. And this proposal is based entirely upon your

desire to maintain what you say are the standard differentials from Indiana mines?

"A. Yes, sir.

"Q. What consideration did you give to the consumers of coal in making this proposal?

"A. I think a very important consideration.

"Q. You must have, to have advocated an increase of 15 cents a ton."

(p. 1858)

"A. Well, first, now, I will have to answer that last question. I advocate that because the carriers are proposing increases in the rates from Illinois and these rates are based on that. I have no objection to the rates from Illinois remaining where they are and our rates adjusted to give us our rates based on standard differentials.

"Q. Do you subscribe to the proposal of the carriers that 15 cents a ton is justified?

"A. In the rates from—

"Q. The increase of 15 cents per ton in the present rates is justified?

"A. From where, Mr. Bather?

"Q. From Illinois, Indiana, or West Kentucky.

"A. I say the increase of 15 cents per ton as proposed is not justified from all groups because it then does not establish rates in their proper relationship.

"Q. Then why did you propose an increase in the rates from the Brazil-Clinton District to Rockford of from $1.80 to $1.95?

"A. If you will read the heading of this statement, you will notice it says, 'Statement Showing The Rates That would obtain from the Indiana Groups to the Representative Destinations and to a Composite of the Representative Destinations, Based on the Standard Differentials Between the Indiana Groups and the Illinois Groups.' I am not advocating those rates; I am showing what our rates should be based on the rates the carriers are advocating from the Illinois mines."

(p. 1874)

"ings. That is an obvious and accepted fact. And they are simply interested in an ability to move their coal in order to get those earnings.

"Q. (By Mr. Stadell) Yes, I am familiar with your theory on that, Mr. Scott.

"A. Thank you.

"Q. You stated, as I understood you in your direct testimony, that the present rates from the various Indiana groups to the Northern Illinois points involved are unjust and unreasonable under Section 1 of the Interstate Commerce Act.

"A. I believe that is—yes, that is true.

"Q. And on that basis, those rates being unjust and unreasonable should, in your opinion, be reduced to a just and reasonable basis, should they not?

"A. From Indiana?

"Q. Yes. You said they were unjust and unreasonable. Now, if they are unjust and unreasonable, they should be reduced to a reasonable basis.

"A. My contention is they are unjust and unreasonable, relatively speaking; that is with relation to the rates from Illinois.

"Q. In other words, you make a distinction between relative unreasonableness and intrinsic unreasonableness, is that right?

"A. That is right. My testimony here does not purport to go into the unreasonableness of rates *per se*. It goes into the unreasonableness of the rates with relationship to the rates from Illinois."

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"Exam. Trezise: And you are now talking about the present rates or the proposed rates?

"Mr. Stadell: He is talking about the present rates.

"The Witness: I am talking about both.

"Q. (By Mr. Wilkinson) In answer to that question, you are talking about the present rates, are you not, Mr. Scott?

"A. Yes, present rates. I thought he meant—

"Exam. Trezise: All right, present rates.

"Q. (By Mr. Stadell) And you are here, as I understand it, supporting the railroads' 13th Section petition for an increase in the present Illinois rates, intrastate rates, to Northern Illinois. That is your position, isn't it? That is what you said?

"A. No, I don't think that is my position by what I said, Mr. Stadell. I disagree with you.

"Q. Are you opposing that 13th Section petition?

"A. Neither am I opposing it. I am in it for the reason that I want the Commission, in settling these rates under Section 13 of the Act, and as well as under Section 3, to make rates from Indiana which are on their proper level as compared with the rates from Illinois.

"Now, it is not material to me whether the Interstate Commerce Commission arrives at that by increasing the rates from Illinois, by reducing the rates from Indiana or by increasing them partially from one and reducing them partially from the other."

(p. 1876)

"Q. Well, let's take—you say your present rates. Your present rates to these Northern Illinois points are unjust and unreasonable. Let's just take those as a starting point. That is what you said, isn't it?

"A. Yes.

"Mr. Wilkinson: Four times so far.

"Mr. Stadell: All right, the record will show that, Mr. Wilkinson, without your interruption.

"Q. (By Mr. Stadell) Now, what is the present rate—first I will ask you this: Would you say that Rockford, Freeport, and Dixon, Illinois, are the three most important of the representative suspended points involved in this proceeding, from a coal-consuming standpoint?

"A. Rockford and Freeport, and probably Dixon. I believe those are the most important, yes.

"Mr. Trezise: Are you bringing in Beloit too?

"Mr. Stadell: No, I am talking about Northern Illinois.

"Mr. Cardy: That is between Indiana and Southern Illinois.

"Mr. Stadell: I am not talking about that. I am talking about the importance of them as coal-consuming points.

"Exam. Trezise: Just Northern Illinois.

"Q. (By Mr. Stadell) Now, what is the present rate from the Boonville, Indiana, group and from the Southern Illinois group to Rockford?"